

IN THE SUPREME COURT OF MISSOURI

INVESTORS TITLE COMPANY, INC.)	
)	
Plaintiff/Respondent/)	
Cross-Appellant,)	No. SC87669
)	
v.)	
)	
JANICE HAMMONDS, et al.,)	
)	
Defendants/Appellants/)	
Cross-Respondents.)	

SUBSTITUTE BRIEF OF RESPONDENT/CROSS-APPELLANT
INVESTORS TITLE COMPANY, INC.

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 - A. County's reliance on § 432.070 RSMo is misplaced because a claim for money had and received can be made against a political subdivision even in the absence of a formal writing.
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JURISDICTIONAL STATEMENT

In this action, Plaintiff Investors Title Company, Inc. (“Investors”) seeks refunds of overpayments made to the St. Louis County Recorder of Deeds office (“Recorder’s office”). This appeal originated in the Missouri Court of Appeals, Eastern District. On May 30, 2006, this Court granted Defendants/Appellants’ application for transfer pursuant to Rule 83.04. This Court has jurisdiction pursuant to Mo. Const. Art. V, § 10.

Defendants Janice Hammonds, Recorder of Deeds and St. Louis County, Missouri (hereinafter collectively referred to as the “County”) appeal the judgment in favor of Investors in the amount of \$499,391.00 on Investors’ action for money had and received, LF 358, Appellant’s A1, and the Amended Judgment and Order adding prejudgment interest of \$143,703.46 and increasing the total amount to \$643,092.46. LF 375, Appellant’s A2. Investors appeals the judgment limiting recovery on the claim for money had and received to three years from the date of the Petition, LF 358, Appellant’s A1, and appeals the order sustaining County’s motion for directed verdict as to Count V and Count VII of the Amended Petition, regarding violation of due process and equal protection rights. LF 336, Appendix at 2 (hereinafter the Appendix shall be abbreviated as “A”).

STATEMENT OF FACTS

The primary focus of this case is simple. From December 1996 through September 2001, the St. Louis County Recorder of Deeds Office (“Recorder’s office”) overcharged Investors \$727,215.00 in connection with services provided by the Recorder’s office to Investors. Transcript at 61 (hereinafter the Transcript shall be abbreviated as “T”); Exhibit 5, Summary of Unrefunded Overcharges for Five Years. (hereinafter Exhibit shall be abbreviated as “Ex”). The amount of overcharges occurring specifically from December 1998 to September 2001 was in the amount of \$499,391.00. T at 58-59; Ex. 4, Summary of Unrefunded Overcharges For Three Years. None of the overcharges were ever paid back by County to Investors. T at 61, 140-141. Investors, under multiple theories, seeks return of these monies.

To begin, some background of the operations of St. Louis County is necessary. As part of its regular business operations, Investors delivered substantial numbers of documents on a daily basis to County for recording. T at 44-47. During the time period in question, there were two systems for recording documents with the County. T at 141-166. Individuals who came in to record documents had to wait while their documents were processed by the clerk and then paid the cost for the recording fees. T at 141-147. The County’s procedure for title companies was different. T at 147-148. The County developed a procedure to facilitate dealings with title companies which filed a substantial number of documents on a daily basis. T at 147-166. Title companies were not required to

wait for the clerks to process their documents but instead signed their documents in with the Recorder's office and then left. T at 148-151.

Pursuant to this procedure the County instructed Investors that it was to deliver its documents to be recorded with a signed blank check made payable to the Recorder of Deeds. T at 50, 54. The County would then complete each blank check provided by Investors by filling in the total charges actually incurred by Investors for the various services provided by the County to Investors. T at 51, 95-97. Investors was given no other option and therefore began delivering a blank check with its documents. T at 51, 72. After the documents were recorded, Investors would get back a set of invoices listing each transaction and its cost. T at 176-177; Ex. 8A, Example of Documents Returned to Investors' Title by St. Louis County. Attached to the invoices was an adding machine tape, prepared by the cashier, an employee of the County, which purported to total all the recording receipts. T at 52, 70, 85; Ex. 8A. The total on the adding machine tape matched the amount filled in by the County on the check provided by Investors. T at 52; Ex. 8A. The completion of the blank check was done by the County before the documents showing the charges for recording, copying, or other fees, were given to Investors. T at 52-54. The checks were deposited into the accounts of the County. T at 97-98, 238. Investors did not receive any documentation with which to reconcile the amount of the check until after the check had been completed, submitted, and processed. T at 52-54.

The County also had a practice and procedure whereby they would

regularly refund any overpayments of fees made by persons to the Recorder of Deeds, or overcharges of fees by the Recorder to such persons. T at 117-122, 264-265; Ex. 19, St. Louis County Department of Revenue Cash Handling Procedures at p. 4; Ex. 20, St. Louis County Revenue Department Notice dated July, 2000; Ex. 21, Memorandum from Janice Hammonds to Loraine Miller, dated January 14, 2000. In fact, the Recorder's office would regularly refund voluntarily and without the request of the person or title company who paid the fees. T at 120-122, 264-265; Ex. 21, Special Transit Reports for 1997-2001. These refunds constituted hundreds of refunds and thousands of dollars refunded. Ex. 21, Special Transit Reports.

The transactions involving title companies were to be controlled by a number of writings. First, there was the County's own Cash Handling Procedures. Ex. 19, Cash Handling Procedures. There were also the documents for the daily transactions. Ex. 8A, Investors Title Co. Receipts from St. Louis County for September 31, 2001; Ex. 24, Investors Title Co. Receipts for August 8, 2001; Ex. 32, Original Investors Title Co. Receipts for January 20, 2005; Ex. 25, copy of Investors Title Co. Check to St. Louis County. These documents were a part of every transaction Investors had with the County. T at 52-4, 84-6, 95; T at 142-6. The County also had a written policy on overcharges. Ex. 19, Cash Handling Procedure at p. 21; Ex. 22, Memorandum of Janice Hammonds to Lorraine Miller, and which it posted publicly, Ex. 20, Notice of Refund Policy for the Recorder of Deeds. The County's own records established a refund practice. Ex. 21, Special

Transit Reports. Finally the activities of the Recorder of Deeds Office are established by state law. T at 143.

Upon these background facts arises Investors' claims. Beginning at least as early as 1995, and without Investors' knowledge, consent, or participation, the County, acting by and through an employee, began charging Investors amounts in excess of the actual costs and fees for recording, copying and other fees by completing the blank check left by Investors each day for an amount in excess of the amounts actually incurred by Investors in conjunction with the recording, copying and other services actually utilized by Investors. T at 55-61, 66-67, 140-141, 199-200, 231-232, 237-238; Ex. 4, Summary of Unrefunded Charges for Three Years; Ex. 5, Summary of Unrefunded Charges for Five Years, Ex. 2, Daily Ledger Summary of Overcharges from January 1996 to September 2001. Investors was not aware of the overcharges and did not voluntarily consent to pay the same. T at 54, 61. Rather, the additional fees and charges were involuntarily paid by Investors when its check was filled out by the County with the higher amounts and cashed by the Recorder's office with the non-disclosed additional charge included. T at 51-54, 67, 177, 364-365.

A County employee took cash from the Recorder of Deed's cash drawer the day Investors submitted its check, which was well before Investors' check had cleared banking processes and was deposited in County's general checking account and available for use by County. T at 97-98, 182-183, 215. When Investors first discovered the assessment and collection of the additional

unauthorized and involuntarily paid amount in September of 2001, it immediately demanded and requested the return of the amounts it was never told about and never intended to pay. T at 54-61. None of the overcharges were ever paid back by the County to Investors. T at 61, 141. The County refused to refund these amounts despite the fact that the County conducted an internal audit and confirmed that Investors' account with County was in fact charged for amounts in excess of the actual fees and charges incurred for the actual services rendered. T at 140, 200-206. Furthermore, when the Recorder performed that audit, it was discovered that the audit packages concerning Investors were missing records. T at 131, 206.

During the time period in question, the County had in place cash management procedures and policies that delineated and separated the financial functions concerning title companies among different employees to provide internal checks within the process. T at 101-102; Ex. 19, Cash Handling Procedures. The proper procedures that County employees were to follow, and the clear delineation of separate and distinct functions for the handling of cash within the cashier's office, are set forth in the Department of Revenue Cash Handling Procedures which governed the cash handling procedures of the Recorder's office. T at Id. According to County's procedures and policies, the cashier was supposed to total all receipts received and then do a complete reconciliation of all the cash and the receipts of that day. T at 102-104, 263-264. The lead cashier was to then review the cashier's reconciliation for accuracy. T at 104, 263; Ex. 19, Cash

Handling Procedures. However, that was not the actual practice within the Recorder of Deed's office for the time period in question. T at 105, 291-292, 347-349, 410-411, 428-429. The lead cashier started taking over duties that the cashier should have been doing, eliminating the second check. T at 105. In fact, the cashier was doing all of the totaling and tallying for one set of title companies, while the head cashier was doing all the totaling and tallying for another set of title companies, which included Investors. T at 105-106, 347-349. According to the policies and procedures, the lead cashier was also to prepare an audit package on a daily basis. T at 123-124; Ex. 19, Cash Handling Procedures. The Cash Handling Procedure dictated that every six months random audits were to be performed by the Chief Deputy or Recorder to uncover improper activities. T at 267-269, 289; Ex. 19, Cash Handling Procedures. Part of the audit procedure would include looking at the charges for an individual title company to see how it compared to the check received from that title company. T 267.

County employees breached the County's cash handling protocol set forth in County's Cash management policy for more than six years through the regular, daily process of performing all financial functions concerning Investors. T at 291-292. County had a system in place that would have detected the overcharges long before fall of 2001 had it been properly monitored and performed. T at 280-288. Two documents generated by the County on a daily basis, the DK08 and BL02, provided a summary of transactions for the day including the number of transactions, number of checks received, amount of checks and cash received, and

the total amount for deposit. T at 280-288; Ex. 14, DK08 and Ex. 15, BLO2. These documents were generated as a control feature and if the amounts received as checks and cash did not match up between the two documents, the County was put on notice that there was a problem that needed to be further investigated. T at 280-288. These two documents were included in the daily audit packages and their review was part of the random audit obligation as dictated by the cash handling procedures of the Recorder's office. T at 289. The Recorder's office violated its own cash management policy because it failed to properly supervise its employees, failed to make sure the written cash handling procedures were being followed, failed to reconcile cash and check amounts and failed to conduct any random audits of the monetary transaction figures and recording receipts prepared by its employees during the time period in question. T at 88-93, 114, 289-290. The County's own expert, its auditor, admitted these gross errors. T at 419-430.

Investors brought this suit against County, Recorder, and Norris Acker, Director of Revenue ("Director") seeking to recover the overpayments. LF 45 at ¶22. The First Amended Petition, LF 41-57, includes nine counts: Count I - Declaratory Judgment and Common Law Refund; Count II - Breach of Contract; Count III - Establishment of Prepaid Accounts; Count IV - Neglect of Duty; Count V - Due process claim under 42 U.S.C. §1983; Count VI - RESPA claim under 42 U.S.C. §1983; Count VII - Equal protection claim under 42 U.S.C. §1983; Count VIII - Negligence; and Count IX - Conversion. The Trial Court dismissed or granted summary judgment as to Counts II, III, IV, VIII, and IX. LF 304, A1.

Investors voluntarily dismissed Count VI (RESPA claim under 42 U.S.C. §1983) as well as all claims against Director. LF 332. The case proceeded to a jury trial on Counts I (Common Law Refund), V (Due Process) and VII (Equal Protection).

At the close of Investors' evidence, County moved for a directed verdict on all three remaining counts, T 368-369, which was denied. T 370, 375, 383. At the close of all the evidence, the Trial Court granted County's motion for a directed verdict on Count V, T 445, and VII, T 448, and denied each side's motion for a directed verdict on Count I, T 439, 451. At the instructions conference, T 452-459, the Trial Court overruled County's objection to Instruction No. 8 (withdrawal instruction), LF 346, which instructed the jury not to consider evidence that Investors did not take action to verify charges made by Recorder, T 456-457, and refused Instruction No. A (five year statute of limitations - submitted by Investors), LF 350, Instruction No. F (reliance by plaintiff on defendants' calculations - submitted by Investors), LF 355, Instruction No. B (one year statute of limitations - submitted by County), LF 351, Instruction C (change of circumstances defense - submitted by Defendants), LF 352, Instruction D (consent defense - submitted by County), LF 353, and Instruction E (failure to mitigate damages - submitted by County), LF 354. T 453-454.

The jury returned a verdict in favor of Investors and assessed damages at \$499,391.00. LF 356-357. On January 27, 2005, the Trial Court entered judgment for Investors for \$499,391.00. LF 358, Appellant's A1. Defendants filed a motion for judgment notwithstanding the verdict or for a new trial, LF 359-363. Investors

filed two separate motions to amend the judgment, LF 364-371, and a motion for judgment notwithstanding the verdict, LF 372. On February 28, 2005, the Trial Court denied all post trial motions, except for Investors' Second Motion to Amend the Judgment. LF 368. That motion was granted in part and the judgment was amended to add prejudgment interest of \$143,701.46, for a total judgment of \$643,092.46. LF 374-375, Appellant's A2. County appealed, LF 376, and Investors Cross-Appealed. LF 389.

POINTS RELIED ON

RESPONSE TO APPELLANTS' SUBSTITUTE BRIEF

I. The Trial Court did not err in denying County's motion for a directed verdict and motion for judgment notwithstanding the verdict on Count I (Declaratory Judgment and Common Law Refund) because Investors made a submissible case in that:

A. County's reliance on § 432.070 RSMo is misplaced because a claim for money had and received can be made against a political subdivision even in the absence of a formal writing.

B. In the alternative, assuming that § 432.070 does apply, the evidence established that a writing in conformity with the statute existed.

Karpierz v. Easley, 68 S.W.3d 565 (Mo. App. W.D. 2002)

First National Bank of Stoutland v. Stoutland School District R2,

319 S.W.2d 570 (Mo. 1958)

Palo v. Stangler, 943 S.W.2d 685 (Mo. App. E.D. 1997)

II. The Trial Court did not err in denying County's motion for a directed verdict and motion for a judgment notwithstanding the verdict on Count I because the evidence did establish the essential elements for money had and received in that there was evidence that County gained from Investors' overpayments, and thus was evidence of a "benefit conferred" or "appreciation by the defendant of the fact of such benefit" as is required for recovery under a theory for money had and received.

Blue Cross Health Services, Inc. v. Sauer, 800 S.W.2d 72 (Mo. App. E.D. 1990)

Mays-Maune & Associates v. Werner Brothers, Inc.,

139 S.W.3d 201 (Mo. App. E.D. 2004)

III. The Trial Court did not err in denying County’s motion for a directed verdict and motion for a judgment notwithstanding the verdict on Count I because the evidence did establish the essential elements for money had and received in that the evidence established acceptance and retention by County of the overpayments which unjustly enriched County at the expense of Investors.

Western Casualty & Surety v. Kohm, 683 S.W.2d 798 (Mo. App. E.D. 1982)

Blue Cross Health Services, Inc. v. Sauer, 800 S.W.2d 72 (Mo. App. E.D. 1990)

Williams v. Carroll County, 66 S.W.3d 955 (Mo. 1902)

IV. The Trial Court did not err in giving Jury Instruction NO. 8 (withdrawal instruction) because evidence of Investors’ failure to examine the receipts provided each day by County did not concern an issue still before the jury in that a payor’s lack of care will not diminish its right to recover, and Jury Instruction No. 8 incorrectly stated the law to be applied.

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Dobson v. Winner, 26 Mo. App. 329 (Mo. 1887)

Williams v. Carroll County, 66 S.W.3d 955 (Mo. 1902)

V. The Trial Court did not err in refusing the give proffered Jury Instruction No. C stating County’s “change of circumstances” defense

because County failed to show a change of circumstances and that they were no more at fault for the overcharges than Investors and were therefore not able to assert such a defense.

Ince v. Money's Building and Development, Inc.,

135 S.W.3d 475 (Mo. App. E.D. 2004)

Blue Cross Health Services, Inc. v. Sauer, 800 S.W.2d 72 (Mo. App. E.D. 1990)

Williams v. Carroll County, 66 S.W. 955 (Mo. 1902)

RESPONDENT/CROSS-APPELLANTS' POINTS ON APPEAL

VI. The Trial Court erred in giving Jury Instruction No. 10 limiting Investors' recovery to three years prior to the date of filing suit because under § 516.120 RSMo Investors is entitled to damages for five years prior to the filing of its Petition because the suit was against St. Louis County and the matter should be remanded for entry of Judgment accordingly as Investors presented sufficient evidence to determine damages dating back five years.

Sam Kraus Co. v. State Highway Commission, 416 S.W.2d 639 (Mo. 1967)

Wood v. County of Jackson, 463 S.W.2d 834 (Mo. 1971)

§ 516.120 RSMo 2000

§ 516.130 RSMo 2000

VII. The Trial Court erred in granting County's motion for a directed verdict on County V because Investors produced sufficient evidence to support a judgment on the claim brought under 42 U.S.C. § 1983 for violation of Investors' rights under the due process clause of the U.S. Constitution in

that County overcharged Investors for recording services, the overcharging resulted from County's deviation from its own established policies and practices, and County failed and refused to refund such overcharges.

Board of County Commissioners v. Brown, 520 U.S. 397 (1997)

City of Canton v. Harris, 489 U.S. 378 (1989)

42 U.S.C. § 1983

VIII. The Trial Court erred in granting County's motion for a directed verdict on Count VII because Investors introduced sufficient evidence to support a claim brought under 42 U.S.C. § 1983 for violation of Investors' rights under the equal protection clause of the U.S. Constitution in that County unlawfully and intentionally discriminated against Investors when it violated its established policies and procedures by refusing to issue Investors a refund for overpayments made for County services, thereby treating Investors differently from other individuals and entities similarly entitled to a refund.

Batra v. Board of Regents, 79 F.3d 717 (8th Cir. 1996)

Johnson v. City of Minneapolis, 152 F.3d 859 (8th Cir. 1998)

42 U.S.C. § 1983

IX. The Trial Court erred when it granted the County's motion for summary judgment on Count VIII (Negligence) and Count IX (Conversion) of Investors' First Amended Petition on the grounds that the County did not waive sovereign immunity because the County did have insurance coverage

for torts of this nature which applied to this Count.

Langley v. Curators of the University of Missouri,

73 S.W.3d 801 (Mo. App. W.D. 2002)

ARGUMENT

I. The Trial Court did not err in denying County's motion for a directed verdict and motion for judgment notwithstanding the verdict on Count I (Declaratory Judgment and Common Law Refund) because Investors made a submissible case in that:

A. County's reliance on § 432.070 RSMo is misplaced because a claim for money had and received can be made against a political subdivision even in the absence of a formal writing.

B. In the alternative, assuming that § 432.070 does apply, the evidence established that a writing in conformity with the statute existed.

The standard of review of a trial court's denial of a motion for directed verdict or judgment notwithstanding the verdict is whether the plaintiff has made a submissible case. *See First State Bank of St. Charles, Missouri v. Frankel*, 86 S.W.3d 161, 169 (Mo. App. E.D. 2002). To make a submissible case, a plaintiff must present substantial evidence for every fact essential to liability. *Id.* Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide a case. *Id.* In determining whether a plaintiff made a submissible case, this Court views the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff. *Id.*

An action for money had and received is proper where the defendant received money from the plaintiff under circumstances that in equity and good conscience call for the defendant to pay it to plaintiff. *Palo v. Strangler*, 943

S.W.2d 683, 685 (Mo. App. E.D. 1997); *Dickey v. Royal Banks of Missouri*, 111 F.3d 580, 583 (8th Cir. 1997). The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains money or property of others without authority, the law, independent of any statute, will compel restitution. *Ballard v. Clay County, Missouri*, 355 S.W.2d 894, 897 (Mo. 1962). An action for money had and received “sounds in contract.” *Palo*, 943 S.W.2d at 685. It is a broad and flexible action; and although the action is legal, it is based upon equitable principles. *Id.* A claim for money had and received is contractual in nature. *Id.*

As in *Palo*, Investors sought reimbursement of amounts charged to, and involuntarily paid by Investors in excess of the actual fees incurred in connection with the actual filings done by Investors and/or the actual copies requested and received by Investors. LF 47-48. County claims that § 432.070 RSMo¹ bars the claim and state that no written contract between Investors and County existed. Appellants’ Substitute Brief p. 19-20. The County claims that Investors cannot recover on a claim of money had and received absent a written contract. Appellants’ Substitute Brief p. 20.

¹ Section 432.070 RSMo states, in part: “No county...or other municipal corporation shall make any contract, unless...such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.”

A. County’s reliance on § 432.070 RSMo is misplaced because a claim for money had and received can be made against a political subdivision even in the absence of a formal writing.

Contrary to County’s position, Missouri recognizes the claim for money had and received against a political subdivision even in the absence of a formal writing. County asserts that “the inquiry becomes whether contract liability may be imposed upon County under the operative facts.” Appellants’ Substitute Brief p. 19. However, although a claim for money had and received “sounds in contract”, such claims are not based on express contract, but rather on equitable principles permitting recovery of money from defendant that, in all justice and fairness, the evidence shows defendant should not keep. *Kubley v. Brooks*, 141 S.W.3d 21, 18 (Mo. 2004). A contractual relationship is not necessary to maintain an action for money had and received, even against a Missouri political subdivision. *Karpierz v. Easley*, 68 S.W.3d 565, 570 (Mo. App. W.D. 2002).

A suit for money had and received is an action at law founded upon an implied contract created by law.

Wetscheff v. Medical Ctr. Of Independence, Inc., 604 S.W.2d 796, 801 (Mo. App. W.D. 1980). “[A] contract ‘implied in law’ or ‘quasi-contract’ ‘is not a contract at all but an obligation to do justice even though it is clear that no promise was ever made or intended.’” *Westerhold v. Mullenix Corp.*, 777 S.W.2d

257, 263 (Mo. App. E.D. 1989) (quoting *Calamari & Perillo*, CONTRACTS, § 1-12 (2d ed. 1977)). “It is not necessary that an express promise to pay or privity of contract be pleaded or shown, for the law implies both.” *Brandkamp v. Chapin*, 473 S.W.2d 786, 788 (Mo. App. 1971). “This non-contractual obligation is treated procedurally as if it were a contract, but its principal function is to prevent unjust enrichment.” *Westerhold*, 777 S.W.2d at 263.

Karpierz, 68 S.W.3d at 570.

In *Karpierz*, the plaintiff’s claim was in assumpsit for money had and received, and the state defendant mounted a defense on the basis of §432.070 RSMo. The plaintiff brought suit against Kansas City, the Missouri Chief of Police and the Kansas City - Missouri Board of Police Commissioners on an action for assumpsit for money had and received. The plaintiff was arrested and the police searched him, his van and home pursuant to a valid warrant. Substantial funds and drugs were discovered on the plaintiff and in the plaintiff’s home during the search. Rather than follow the procedures required under Missouri’s Criminal Asset Forfeiture Act (“CAFA”) however, a detective from the Kansas City P.D. chose instead to contact the DEA and invited the DEA to conduct its own investigation of the plaintiff and alerted them of the drugs and money that were

discovered in the plaintiff's home. Thereafter, the DEA went to the plaintiff's home, seized the money and then later returned a portion of the funds to the Kansas City P.D. under a "sharing" arrangement.

The trial court initially dismissed the plaintiff's case, having ruled that the CAFA did not apply because the "decision to seize the money was made by the [DEA], a federal authority." *Karpierz*, 68 S.W.3d at 569. On appeal, however, the Court of Appeals held that compliance with the CAFA was mandatory and remanded the case. *Id.* The trial court entered its judgment finding that the plaintiff was entitled to relief under his claim for assumpsit money had and received. *Id.* The court ruled that the defendants had been unjustly enriched by way of their failure to follow the mandatory procedures prescribed by the CAFA. *Id.*

The defendants appealed, arguing – *inter alia* – that the trial court improperly determined that the plaintiff could recover under the claim for money had and received. *Karpierz*, 68 S.W.3d at 570. The defendant Kansas City P.D. moreover argued that it was a municipal institution upon which "no contract may be implied against it to establish the requisite obligation for an action for money had and received." *Id.*, at 572.

On their first point, the defendants argued that the trial court improperly determined that Karpierz could obtain relief under assumpsit for money had and received "because assumpsit requires the court to imply a contractual relationship and under the facts of this case, no such contractual relationship exists or can be

implied.” *Id.*, at 570. The court held, however, that there was a sufficient relationship between the defendants and the plaintiff to give rise to an action for money had and received. *Id.* The court noted that the defendants received the disputed money from the plaintiff by seizing it during the execution of a search warrant. *Id.* The defendants, therefore, had an obligation to properly follow the applicable statutes in their handling of the money seized from the plaintiff. *Id.* The evidence established that the defendants failed to properly handle and process the money seized from the plaintiff, and that the defendants intentionally bypassed the CAFA’s requirements. *Id.*, at 571. Therefore, an express contract need not have existed between the plaintiff and defendants in order for the plaintiff to recover under a claim for money had and received. *Id.*

On the defendant’s latter point – that the Kansas City P.D. was a municipal institution upon which no contract may be implied against for an action for money had and received – the court held that neither §432.070 RSMo or the interpretative cases applied to the case. *Id.*, at 573. The court determined that the plaintiff’s theory of recovery was not based on a contract implied in fact. *Id.* “Unlike a contract implied in fact, a contract implied in law is imposed, or created, without regard to the promise of the party to be bound.” *Id.* A contract implied in law is not actually a contract and, instead, is an obligation to do justice where no promise was ever made or intended. *Karpierz*, 68 S.W.3d at 573. The court noted that the defendant’s duty to handle the seized money as prescribed by the CAFA was binding. *Id.* “Thus, the provisions of §432.070 do not render the obligation at

issue void, as they would in a case where a contract was implied in fact, and the trial court's finding of a contract implied in law does not run afoul of the cases providing that §432.070 serves to preclude remedies against municipal entities which are based upon contracts implied in fact." *Id.* The trial court's judgment was affirmed. *Id.*

County attempts to discredit the *Karpierz* decision by citing to cases such as *Donovan v. Kansas City*, 175 S.W.2d 874 (Mo. Banc 1943) and *Carter v. Reynolds County*, 288 S.W. 48 (Mo. 1926) where the Court held that § 432.070's precursor barred the claimants' requested relief. County further relies on the decision in *Fulton National Bank v. Callaway Memorial Hospital*, 465 S.W.2d 549 (Mo. 1971) where the Court relied on § 432.070 and denied the claim for money had and received. However, what County fails to recognize is that the *Karpierz* decision adequately distinguishes such cases as the facts in such cases evidence theories of recovery based on contracts implied in fact rather than implied in law. *See Karpierz*, 68 S.W.3d at 573.

Similar to *Karpierz*, Investors' theory of recovery is not based on a contract implied in fact, but on a contract implied at law. The Recorder's office is established by, and the duties of such Recorder are set forth in the Charter of St. Louis County. Pursuant to Article IV, Part 5, of the Charter of St. Louis County, the Director of Revenue is charged with the recording of all instruments and the supervision of the performance of all related duties and powers to be performed by the Recorder, and the Recorder is obligated to exercise the duties given by law or

ordinance to the Recorder.

The evidence established that County had in place a policy and procedure whereby County issued refunds for any payments that exceeded those properly charged fees for recording, filing, copying or other services of the Recorder's Office, and County in fact regularly and routinely issued required refunds for such overpayments or overcharges in compliance with its established policies and procedures. T at 117-122, 264-265; Ex. 19, Cash Handling Procedures. As the County's obligation to handle money for recording deeds and copying arises out of law from the Charter of St. Louis County and their own policies and procedures, Investors' theory of recovery is based on a contract implied at law. The County had a duty to handle the money collected from Investors as fees for services as prescribed by their own fee collecting policies and procedures which were instituted pursuant to County's rights under the Charter.

This case has a significant factual distinction from the line of cases cited by County. Each case relied upon by County involves a third party vendor providing services for goods to the political subdivision. This case is the exact opposite. Here it is the County that provides the services to the public. The County is required by state law to provide recording services. Chapter 59, County Recorder of Deeds, Section 59.010 RSMo. *et. seq.* In providing these services the County completely controls the manner in which the transactions are authenticated and documented. More importantly as a policy consideration, and as amply demonstrated by this case, County completely controls the manner and method of

payment for the services it, not a third party, provides. Thus, the County cannot complain about lack of documentation when it controls the activity. Moreover, to require private citizens or corporations to draft and enter into a written contract each and every time they utilize the County's services is an absurd notion.

The facts in *Palo* and *Karpierz* support this analysis. See *Karpierz*, 68 S.W.3d 656; and *Palo*, 943 S.W.2d 683 (Where plaintiff sought reimbursement of an amount of court-ordered child support collected by the Missouri Department of Social Services which exceeded the amount of child support he actually owed). Both involve situations in which the "services", i.e. actions taken by the political subdivision, controlled the manner and types of documentation needed for the transaction. The private citizens were not given the opportunity to provide documentation and have it authenticated by the political subdivision for the transaction.

Denying County's point will not "overturn 100+ years of precedent" as asserted by County. Appellants' Substitute Brief p. 32-33. Rather, the facts in this case, as well as the facts in *Karpierz*, are distinguishable from the precedent cited by County in that a contract implied in law exists and allows recovery against County. A written contract is not in dispute, nor need be, as Investor's claim for money had and received – as noted, *supra* – is premised upon "an obligation to do justice even though it is clear that no promise was ever made or intended." *Karpierz* 68 S.W.3d at 570 (citing *Westerhold*, 777 S.W.2d at 263). Therefore, the County's point should be denied on this basis alone.

B. In the alternative, assuming that § 432.070 RSMo does apply, the evidence established that a writing in conformity with the statute existed.

In the alternative, if § 432.070 RSMo does apply to the instant case, there was sufficient evidence presented that a writing in conformity with the statute existed.

First, state law concerning the duties and obligations of the Recorder of Deeds clearly provides an adequate “writing” for the establishment of a contract. State law establishes the Recorder of deeds office. § 59.010 RSMo. State law also dictates the types of documents to be recorded and the fees to be charged. §§ 59.310, 59.319, 59.330 and 59.800 RSMo. State law even dictates some payment and collection procedures, e.g., §§ 59.250 and 59.567 RSMo. These statutes alone, setting forth the duties and responsibilities of the recorder of deeds concerning the citizens of this State, constitute an adequate writing to satisfy § 432.070.

The evidence in this case also establishes other “writings” to support the existence of a contract under § 432.070. *First National Bank of Stoutland v. Stoutland School District R2*, 319 S.W.2d 570 (Mo. 1958) provides guidance under the facts and circumstances of the instant case. In *Stoutland*, the defendant school district refused to repay loans which prompted the plaintiff bank to institute an action to recover judgment for the principle sums it loaned to the defendant. The defendant asserted that even if any loan agreements were made between the parties, they were invalid and unenforceable because the agreements and loans

were not made in compliance with, *inter alia*, § 432.070 RSMo. *Id.*, at 572.

In *Stoutland* the defendant school district secured advances and borrowed money from the plaintiff for several years, and repaid the loans when it had sufficient revenues to do so. *Id.* In 1953, the defendant's board met "for the purpose of authorizing its officers to enter into a loan arrangement with the bank." *Id.* At the meeting, from which minutes were kept, the board passed a resolution authorizing its officers to borrow \$6,000 from the plaintiff at 6% interest. *Id.* Shortly thereafter, the bank deposited \$6,000 into the defendant's bank account after examining the minutes of the board meeting and without further obtaining any written note or agreement. Similar circumstances arose during the same year, and the plaintiff loaned an addition sum of \$31,000 on the basis of similar minutes of the board's meetings. *Id.*

As noted above, the defendant argued that any loan agreements with the plaintiff bank were unenforceable because of the failure of the parties to make a writing that complied with § 432.070. The Supreme Court noted, however, that the minutes of the defendant's board and the plaintiff's corresponding records comprised a "contract in writing". *Id.*, at 573. These writings included dates, authentication and "the consideration 'to be performed or executed subsequent to the making of the contract.'" *Id.*, (citing § 432.070).

The facts of the instant case establish a long-established relationship between Investors and County that is sufficiently supported by writings to overcome County's arguments with respect to § 432.070. It is the duty of the

Recorder of Deeds to impose and collect fees in conjunction with the recording of written instruments or the requesting of copies of instruments. § 59.310 RSMo. County established policies and procedures for the payment of fees which required the issuing of invoices and the payment of Investors by blank check. T at 147-166; Ex. 19, Cash Handling Procedures. Over the long course of County's implementation and enforcement of the fee collection policy, numerous documents were exchanged between Investors and County. These included listings of the documents recorded and the related charges, invoices prepared by the County upon receipt of payment by Investors, and checks issued by Investors for the payment of services. T at 51-54, 70, 85, 176-177; Ex. 8A, Investors Title Co. Receipts for September 13, 2001; Ex. 24, Investors Title Co. Receipts for August 8, 2001; Ex. 32, Original Investors Title Co. Receipts for January 20, 2005; Ex. 25, Investors Title Co. check to St. Louis County. Under the rubric of *Stoutland*, where the Supreme Court found sufficient definiteness with regard to dates, authentication, and the requisite consideration was exchanged, sufficient writing existed in the instant case to overcome County's invocation of § 432.070.

Accordingly, Investors made a submissible case, and the trial court did not err in denying County's motion for a directed verdict and motion for judgment notwithstanding the verdict on Count I. The County's Point I should therefore be denied.

II. The Trial Court did not err in denying County’s motion for a directed verdict and motion for a judgment notwithstanding the verdict on Count I because the evidence did establish the essential elements for money had and received in that there was evidence that County gained from Investors’ overpayments, and thus was evidence of a “benefit conferred” or “appreciation by the defendant of the fact of such benefit” as is required for recovery under a theory for money had and received.

The standard of review of a trial court’s denial of a motion for directed verdict or judgment notwithstanding the verdict is whether the plaintiff has made a submissible case. *Frankel*, 86 S.W.3d at 169. To make a submissible case, a plaintiff must present substantial evidence for every fact essential to liability. *Id.*

The appropriate action when one party has been unjustly enriched through the mistaken payment of money by the other party is an action at law for money had and received. *Blue Cross Health Services, Inc. v. Sauer*, 800 S.W.2d 72, 76 (Mo. App. E.D. 1990). Investors made a submissible case for money had and received. The elements of a claim for money had and received are: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the fact of such benefit; and (3) acceptance and retention by the defendant of that benefit under circumstances in which retention without payment would be inequitable. *Mays-Maune & Associates, Inc. v. Werner Brothers, Inc.*, 139 S.W.3d 201, 205 (Mo. App. E.D. 2004). The cause of action for money had and received has always been favored in the law, and the tendency is to broaden its scope.

Karpierz, 68 S.W.3d at 570.

The County claims the first two elements of the claim for money had and received were not proven in that there was no evidence that they gained anything from Investors' overpayments. Appellants' Substitute Brief p. 33-36. They rely on the fact that a County employee "stole from the cash drawer the exact amount by which she overcharged Investors each day" and because the County's daily deposits never exceeded the charges due for that day's recording of documents and other transactions. Appellants' Substitute Brief p. 34-35. Regardless of whether County's daily deposits never exceeded the charges due for that day's recording of documents and other transactions, evidence was presented that a benefit was conferred to County and an appreciation by County of the fact of such benefit. T at 182-183, 195, 242.

The first two elements of the claim for money had and received, (1) a benefit conferred upon the defendant by the plaintiff, and (2) appreciation by the defendant of the fact of such benefit, were met by Investors. *Mays-Maune*, 139 S.W.3d at 205. It is undisputed that Investors made all of its payments by blank check and that a County employee filled in the amount on said check. T at 51, 95-97. The money was taken from the cash drawer on the same day as the transaction, well before Investors payments were deposited in County's general checking account and available for use by County. T at 97-98, 182-183, 215. Thus, whether the County's books balanced at the end of the day (i.e., whether the County's overcharges to Inventors equaled the decrease in cash in the Recorder's

cash drawer *resulting from its own employee's theft of cash payments made by individuals and entities other than Investors*) has nothing whatsoever to do with the relevant issue in this case - whether the County in fact received, and improperly kept, the full amount of Investors' checks, including the improperly assessed overcharges. County received the excess money from Investors and deposited the same in County's general checking account. T at 98. By receipt of the overpayments, County was enriched at the loss and expense of Investors.

III. The Trial Court did not err in denying County's motion for a directed verdict and motion for a judgment notwithstanding the verdict on Count I because the evidence did establish the essential elements for money had and received in that the evidence established acceptance and retention by County of the overpayments which unjustly enriched County at the expense of Investors.

The standard of review of a trial court's denial of a motion for directed verdict or judgment notwithstanding the verdict is whether the plaintiff has made a submissible case. *Frankel*, 86 S.W.3d at 169. To make a submissible case, a plaintiff must present substantial evidence for every fact essential to liability. *Id.*

An action for money had and received is proper where the defendant received money from the plaintiff under circumstances that in equity and good conscience call for defendant to pay it to plaintiff. *See Kuble*, 141 S.W.3d at 29. When one party has been unjustly enriched at the expense of another, the beneficiary can be compelled to make restitution to the one conferring that benefit.

Lucent Technologies, Inc. v. Mid-West Electronics, Inc., et al., 49 S.W.3d 236, 241 (Mo. App. W.D. 2001). The court considers the nature of the mistake, the circumstances under which it was made, the conduct of the payee, and so on, insofar as these factors indicate whether it would be “unjust” to permit retention of the benefit. *Western Casualty & Surety Company v. Kohm*, 683 S.W.2d 798, 800 (Mo. App. E.D. 1982). The question is whether County was enriched at the expense of Investors so that, under the circumstances, it would be unjust to allow the County to retain the benefit. *See Kubley*, 141 S.W.3d at 29.

The County heavily relies on the evidence that Investors failed to reconcile their payments with the actual charges despite being provided with receipts on a daily basis that contained all needed information. Appellants’ Substitute Brief p. 40-41, T 391. County further relies on *Restatement, Restitution*, §142 for a change of circumstances defense.

County cites *Restatement, Restitution*, §142, comment b, for the proposition that where an agent steals money from a third person which he deposits to a principal’s account, if the money is stolen or if the agent is thereby enabled to steal other money from the principal before the principal becomes aware of it, the principal’s duty of restitution is terminated or is diminished *pro tanto*. The County’s reliance on a comment to a section of the *Restatement, Restitution* is misplaced. The “change of circumstances” defense asserted by County “may be a defense or a partial defense if...the recipient...was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant.” *Restatement*,

Restitution, §142(2).

In the present case, while the Eastern District did not specifically cite to the *Restatement, Restitution*, §142, the Court did cite to and apply both *Kohm*, 638 S.W.2d 798 (Mo. App. E.D. 1982) and *Blue Cross Health Services*, 800 S.W.2d 72 (Mo. App. E.D. 1990). Both *Kohm* and *Blue Cross Health Services* were also cited and relied upon by County. Appellants' Substitute Brief p. 41. While both cases acknowledge *Restatement, Restitution* §142, those cases illustrate that the instant facts do not preclude Investors from recovering under its claim for money had and received. See *Kohm*, 638 S.W.2d at 801 (Where Court found no change of circumstances); *Blue Cross Health Services*, 800 S.W.2d at 76 (Where Court found no change of circumstances).

It has long been established that a payor's lack of care will not diminish the right to recover or somehow justify retention of a windfall by an unintended beneficiary. *Kohm*, 638 S.W.2d 7at 801. "A person who pays money to another by mistake is entitled to restitution from the payee or other beneficiary of the payment. *Blue Cross Health Services*, 800 S.W.2d at 75; citing [Restatement, Restitution] §22 at 97. ***This is true even though the mistake is due solely to the payor's 'lack of care' id. 59 at 232, or 'inadvertence,' as well as where the payee share in payor's mistake.***" *Blue Cross Health Services*, 800 S.W.2d at 75 (emphasis added); see also *Kohm*, 638 S.W.2d at 801. The question is [in a suit in assumpsit for money had and received] whether the plaintiffs have paid money by mistake, which is rightfully his. *Dobson v. Winner*, 26 Mo. App. 329, 335 (Mo.

1887). *“If they have, their alleged negligence in failing to ascertain the true state of affairs will not affect their rights.”* *Id.* (emphasis added).

Even if the evidence did establish that Investors was partially at fault for the overpayments, the County still owed a duty of restitution despite Investors’ “lack of care” or “inadvertence”. *See Blue Cross Health Services*, 800 S.W.2d at 75; quoting *Restatement, Restitution*, §1 at 1 (1937). Furthermore, the County was more at fault for the overpayments. County owed a duty to those utilizing their services, such as Investors, to follow their fee collecting policies and procedures, oversee its employees, and run random audits. County failed in all respects.

Contrary to County’s assertion that in the present case, the Eastern District “failed to explain by King’s theft of plaintiff’s overpayments did not terminate or diminish County’s duty of restitution”, Appellants’ Substitute Brief p. 41, the evidence establishes, and the Eastern District acknowledged and discussed, that the County could also have discovered the overpayments. In fact, County was considerably more at fault than Investors in this case. The evidence demonstrates that County established procedures that required Investors and other title companies to submit blank checks and by which County’s authorized individuals would complete those blank checks on behalf of Investors and other title companies, and that County would process and cash those checks without further review by Investors. T at 50-54, 72, 95-97, 147-166. Investors was forced to acquiesce to the blank check procedures implemented by the County, the County required Investors to rely upon County’s employees to complete the checks with

the accurate charges, and Investors in fact did so. T at 50-54, 72, 95-97.

County's contention that the acceptance and retention of the benefit by County is not unjust because Investors failed to "reconcile the charges" and that County's duty of restitution is terminated because of its own employee's conduct is similarly without merit. As noted above, Investors did not receive any documentation with which to "reconcile" the amount of the check until after the check had been completed, submitted, and processed. T at 52-54. Furthermore, Missouri law does not impose an obligation on entities dealing with governments to "reconcile accounts" in order to be entitled to reimbursement for overcharges or overpayments of fees imposed for the provision of services. To the contrary, Missouri law permits Investors to rely solely on Defendants to accurately calculate the amounts owed for recording and other fees. *Williams v. Carroll County*, 66 S.W. 955, 957 (Mo. 1902).

There is no doubt that the County was enriched by the receipt of the overpayment monies. Nor is there doubt that the overpayments were paid by Investors and received by the County under the mistake that the overpayment monies were owed for services. County conducted an internal audit that confirmed that Investors' account with County was in fact charged these additional amounts. T at 200-206. It is also a fact that County accepted the overpayment monies, and retained them, even after knowledge of the circumstances that attended the overpayments. T at 61, 140-141. In equity and good conscience, there is no valid reason why the County should not disgorge such undue profits. A comment to a

section of the Restatement, as relied on by County, is not a sufficient reason to allow County to retain the overpayments, as the Court in both *Kohm* and *Blue Cross Health Services* address the Restatement relied upon by County yet found that a payor's lack of care did not bar recovery on a claim for money had and received. *See Kohm*, 638 S.W.2d at 800-801; *Blue Cross Health Services*, 800 S.W.2d at 75.

From a policy standpoint, allowing County to retain the overpayment monies would render the County ordinances, statutes, and local rules meaningless. County is required to follow certain procedures in collecting money for services. County departed from those procedures. It would certainly be unjust for County to keep the money.

Accordingly, Investors made a submissible case and County's motion for a directed verdict and motion for judgment notwithstanding the verdict on Count I should be denied.

IV. The Trial Court did not err in giving Jury Instruction NO. 8 (withdrawal instruction) because evidence of Investors' failure to examine the receipts provided each day by County did not concern an issue still before the jury in that a payor's lack of care will not diminish its right to recover, and Jury Instruction No. 8 incorrectly stated the law to be applied.

Whether or not a jury was properly instructed is a question of law. *Frankel*, 86 S.W.3d at 173. An instruction shall be given or refused by the trial court according to the law and the evidence in the case. *Id*; Rule 70.02(a). Rule

84.13(b) provides that in order for an appellate court to reverse a judgment the trial court error against the appellant must materially affect the merits of the action. *Klaus v. Deen*, 883 S.W.2d 904, 908 (Mo. App. E.D. 1994). The Court will not reverse a verdict due to instructional error, including the refusal to give an instruction, unless the error is prejudicial, materially affecting the merits of the action. *City of Sullivan*, 142 S.W.3d at 197.

Whether to give a withdrawal instruction is a matter within the discretion of the trial court. *Trimble v. Pracna*, 167 S.W.3d 706, 716 (Mo. 2005). County bears the burden of showing an abuse of discretion. *Arnold v. Ingersollrand Company*, 908 S.W.2d 757, 764 (Mo. App. E.D. 1995). Withdrawal instructions may be given when evidence on an issue has been received, but there is inadequate proof given for final submission of the issue to the jury, *Trimble*, 167 S.W.3d at 716, or, when there is evidence which might mislead the jury in its consideration of the case as pleaded and submitted. *Klaus*, 883 S.W.2d at 905. In determining whether or not the jury was misled, misdirected, or confused by an instruction, the test is whether or not an average juror would properly understand the applicable rule of law being conveyed by the instruction. *City of Sullivan v. Truckstop Restaurants, Inc.*, 142 S.W.3d 181, 197 (Mo. App. E.D. 2004). The trial court may not withdraw evidence if it concerns an issue still before the jury. *Id.*, at 907; *Elfrink v. Burlington Northern Railroad Co.*, 845 S.W.2d 607, 611 (Mo. App. E.D. 1992).

County claims that the trial court erred in giving Jury Instruction No. 8, LF

346, Appellants' A4, patterned after MAI 34.02 [1978 Revision]². As previously argued, it has long been established that a payor's lack of care will not diminish the right to recover or somehow justify retention of a windfall by an unintended beneficiary. *Kohm*, 638 S.W.2d at 801. The question is [in a suit in assumpsit for money had and received] whether the plaintiffs have paid money by mistake, which is rightfully his. *Dobson*, 26 Mo. App. at 335. ***"If they have, their alleged negligence in failing to ascertain the true state of affairs will not affect their rights."*** *Id.* (emphasis added). Furthermore, Missouri law permits Investors to rely solely on County to accurately calculate the amounts owed for recording and other fees. *Williams*, 66 S.W. at 957 (The court noted that the plaintiff was entitled to rely upon calculations of the county to determine amount owed on a bond, and was entitled to a refund on the overpayment as a result of erroneous calculations.)

County completely overlooks that *Restatement, Restitution*, §142 states that the change of circumstances exception ***only applies where the recipient is guilty of no greater fault than that of the claimant.*** *Restatement, Restitution*, §142.

² Jury Instruction No. 8 states: "The evidence that Plaintiff Investors Title Co., Inc. did or did not take action to verify charges made by the St. Louis County Recorder of Deeds is withdrawn from the case and you are not to consider such evidence in arriving at your verdict with respect to Plaintiff's claim against Defendants St. Louis County and Janice Hammonds for money had and received."

County was considerably more at fault than Investors in this case. It was not Investors' actions of failing to examine its receipts that enabled a County employee to overcharge it for County services and then remove cash from the Recorder's cash drawer in the exact amount of the overpayments as argued by County. Appellants' Substitute Brief p. 44. Investors was not provided with the necessary documentation in which to verify and reconcile the charges until **after** the overpayments were made. T at 52-54. County established the procedures that required Investors to submit the blank checks and rely upon County to complete the checks with accurate charges. T at 50-54, 72, 95-97, 147-166. It was County's actions, or inactions, that enabled a County employee to overcharge Investors and remove cash from Recorder's cash drawer, in that County failed to follow its own cash management policy.

For these reasons, any evidence of Investors' actions following the overpayment of monies, specifically evidence regarding whether Investors took action to verify charges made by County, was irrelevant and did not concern an issue still before the jury. The trial court did not abuse its discretion in giving Jury Instruction No. 8, LF 346, Appellant's A4, patterned after MAI 34.02 [1978 Revision].

Assuming, arguendo, that the evidence was relevant, the introduction, discussion, or any questioning about any action or inaction of Investors would have only misled and confused the jury and thus would be highly prejudicial. *Trejo v. Keller Industries, Inc.*, 829 S.W.2d 593 (Mo. App. W.D. 1992).

Accordingly, even if there were some minimal relevance or materiality, the prejudicial nature of this type of information outweighs any and all probative value. Furthermore, if it was error to give the withdrawal instruction, such an error was not prejudicial and did not materially affect the merits of this action.

V. The Trial Court did not err in refusing to give proffered Jury Instruction No. C stating County's "change of circumstances" defense because County failed to show a change of circumstances and that they were no more at fault for the overcharges than Investors and were therefore not able to assert such a defense.

In this Point the County states that the trial court erred when it failed to give a non-MAI instruction. A non-MAI instruction must be brief, simple, impartial, free from argument, and not submit to the jury or require findings of detailed evidentiary facts. *City of Sullivan*, 142 S.W.3d at 197. When using a non-MAI instruction, the instruction must follow the substantive law and be understandable. *Id.* The court in *Ince v. Money's Building and Development, Inc.* reviewed a non-Missouri Approved Instruction that the trial court refused. *See* 135 S.W.3d 475, 480 (Mo. App. E.D. 2004) (Instruction gave guidance in interpreting the contradictory terms in two separate agreements which were in question). The court noted that the instruction inexplicably limited the jury's consideration to three factors, i.e., the contract between the parties, the escrow agreement, and the actions of the parties. *Id.*, at 481. The instruction unfairly emphasized a few factors and excluded other relevant factors which was not

proper, and the trial court did not abuse its discretion in declining to give the instruction. *Id.*

The County claims that the trial court erred in refusing to give proffered Instruction No. C, LF 352, Appellants' A5, not in MAI³. Instruction C was based on *Restatement of Restitution*, §142. The right of a person to restitution from another because of a benefit received is terminated or diminished ***if, after the receipt of the benefit, circumstances have so changed*** that it would be inequitable to require the other to make full restitution. *Restatement of Restitution*, §142(1) (emphasis added). The *Restatement*, and County's own Instruction C, first requires a showing of change of circumstances. The burden of proving a change in position warranting denial of restitution is upon the defendant. *Blue Cross Health Services*, 800 S.W.2d at 76; *Restatement, Restitution*, §142, g Comment at 577. The County has failed to make such a showing. Instead, they focus on all of the situations in which a change of circumstances defense may be used by referencing the latter subsections, caveats, and comments of *Restatement* §142 and

³ Instruction C states: "If you find in favor of plaintiff Investors Title Co., Inc., your verdict must be for defendants St. Louis County and Janice Hammonds if you believe: First, that circumstances have so changed that it would be unjust to require defendants to make restitution; and Second, that defendants were no more at fault than was plaintiff. If any party has failed to use care to ascertain relevant facts, such party is at fault within the meaning of this instruction."

base their entire argument on the allegation that the County was no more at fault than Investors. Appellants' Substitute Brief p. 47. The County completely bypassed the first issue to be addressed, namely, what facts in the record evidence a change in circumstances making it unjust to require them to make restitution. County is unable to point to any such facts, as they do not exist. Therefore, the second question in a change of circumstances defense, whether defendants were no more at fault than was plaintiff, need not even be addressed.

If a change of circumstances did exist, and latter issues regarding fault need to be addressed, County's arguments still fail. The "change of circumstances" defense asserted by County "may be a defense or a partial defense if...the recipient...was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant." *Restatement, Restitution*, §142(2).

As noted above, Investors did not receive any documentation with which to "reconcile" the amount of the check until after the check had been completed, submitted, and processed. T 52-54. More importantly, Missouri law permits Investors to rely solely on County to accurately calculate the amounts owed for recording and other fees. *Williams*, 66 S.W. at 957. Furthermore, while County may rely on *Restatement, Restitution* §142, comment b for its argument that the duty of restitution was terminated, County fails to note that it was County's own actions, or inactions, that allowed the theft to occur.

As shown previously, the County was clearly more at fault than Investors. The evidence demonstrated that County established procedures that required

Investors and other title companies to submit blank checks and by which County's authorized individuals would complete those blank checks on behalf of Investors and other title companies, and that County would process and cash those checks without further review by Investors. T at 50-54, 72, 95-97. Investors was forced to acquiesce to the blank check procedures implemented by County, County required Investors to rely upon County's employees to complete the checks with the accurate charges, and Investors in fact did so. T50-54, 72, 95-97.

County misleadingly states that "the evidence shows that, regardless of how much additional money Defendants might have spent on accounting controls, it could not have eliminated the possibility of theft". Appellants' Substitute Brief p. 47. The evidence clearly reveals that the accounting controls were already in place; however, they were not being properly utilized, which was a violation of County's own cash management procedures and policies. T at 101-106, 123-124, 267-269, 280-288, 291-292, 347-349, 410-411, 428-429; Ex. 19, Cash Handling Procedures; Ex. 14, DK08; Ex. 15, BL02. Review of the DK08 and BL02 forms, prepared and printed daily by County's own computer system, would have established that Investors was overcharged for County services. T at 280-288.

These two documents were included in the daily audit packages and their review was part of the random audit obligation as dictated by the cash handling procedures of the Recorder's office. T at 289. County violated its own cash management policy because it failed to properly supervise its employees, failed to make sure the written cash handling procedures were being followed, failed to

reconcile cash and check amounts and failed to conduct any random audits of the monetary transaction figures and recording receipts prepared by its employees during the time period in question. T at 88-93, 114, 289-290. The County's own expert, its auditor, admitted these gross errors. T at 419-430.

Even if the evidence did establish that Investors was partially at fault for the overpayments, County still owed a duty of restitution despite Investors' "lack of care" or "inadvertence". See *Blue Cross Health Services*, 800 S.W.2d at 75; quoting *Restatement, Restitution*, §1 at 1 (1937). The County was more at fault for the overpayments. The County owed a duty to those utilizing their services, such as Investors, to follow their fee collecting policies and procedures, oversee its employees, and run random audits. County failed in all respects. Therefore, the trial court did not abuse its discretion in not giving Instruction C.

For these reasons this Point should be denied.

RESPONDENT/CROSS-APPELLANT'S POINTS ON APPEAL

VI. The Trial Court erred in giving Jury Instruction No. 10 limiting Investors' recovery to three years prior to the date of filing suit because under § 516.120 RSMo Investors is entitled to damages for five years prior to the filing of its Petition because the suit was against St. Louis County and the matter should be remanded for entry of Judgment accordingly as Investors presented sufficient evidence to determine damages dating back five years.

The standard of review of a trial court's denial of a motion for directed verdict or judgment notwithstanding the verdict is whether the plaintiff has made a

submissible case. *Frankel*, 86 S.W.3d at 169. To make a submissible case, a plaintiff must present substantial evidence for every fact essential to liability. *Id.*

Instruction No. 10⁴, LF 348, A3, was given and the verdict rendered was in accordance with this instruction which limited Investors' recovery to a three year period prior to the date of filing the Petition. The jury's verdict was for the full amount requested by Investors under this three year limitation. The trial court applied the three-year statute of limitation pursuant to § 516.130 RSMo 2000 to County. Section 516.130 provides in pertinent part:

516.130 what actions within three years.

Within three years:

(1) an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity in virtue of his office, or by the commission of an official duty, including the nonpayment of money collected upon an execution or otherwise...

Section 516.130(1) RSMo 2000 pertains to suits against individual office holders and seeks to impose personal liability for actions taken in their official

⁴ Instruction No. 10 states, "If you find in favor of plaintiff Investors Title Co., Inc., you must not include damages that occurred more than three years before December 19, 2001."

capacity. While such a statute may limit personal liability against office holders, it certainly cannot affect claims against the governing body itself. As Investors' claims did not seek to impose any liability on the officer herself, they are outside the scope of the asserted statute. Furthermore, a suit against an officer in his or her official capacity is treated as a suit against the county. *See Gas Service Co. v. Morris*, 353 S.W.2d 645, 647-658 (Mo. 1962); *Liebe v. Norton*, 157 F.3d 574, 577 (8th Cir. 1998). As Investors' First Amended Petition sought recovery against the Recorder of Deeds in her official capacity, the action is one against St. Louis County. *Id.*

The trial court's application of a three-year statute of limitations against County was in error, as the proper statute of limitations to be applied to County was five years, as set forth in §516.120(1) RSMo 2000, which provides in pertinent part:

516.120. What actions within five years.

Within five years:

(1) all actions upon contracts, obligations or liabilities, expressed or implied, except those mentioned in § 516.110, and except upon judgments or decrees of the court of record, and except where a different time is herein limited; ...

The Missouri Supreme Court has held that a five year limitation period applies to claims for breach of contract against the State of Missouri. *See Sam*

Kraus Co. v. State Highway Commission, 416 S.W.2d 639, 640 (Mo. 1967). This includes political subdivisions. *Cf. Heater v. Burt*, 769 S.W.2d 127, 129 (Mo. 1989). (Five year limitations period of §516.120 applies to tort action against City of Florissant.) An action against St. Louis County, a political subdivision of the State of Missouri, is equivalent to an action against the State of Missouri. *See Wood v. County of Jackson*, 463 S.W.2d 834 (Mo. 1971).

During the trial, evidence was presented illustrating the damages suffered by Investors for both a five year and a three year period of time prior to the date of filing Investors' Petition. T 58-59, 61; Ex. 5, Summary of Overcharges for Five Years. Therefore, a solid evidentiary basis exists to base a change in the assessment of damages due to a change in the limitations period. As a matter of law, Investors was entitled to damages that occurred no less than five years before December 19, 2001 and the trial court erred in denying such a motion. A new trial is not needed as Investors has already presented sufficient evidence to determine damages dating back five years from the filing of the Petition. The amount of damages under such a five year period is \$727,215. T 61. If this Court finds that §516.120(1) applies against County, Inventors requests the matter be remanded for entry of judgment for damages pursuant to the five year statute of limitations.

VII. The Trial Court erred in granting County's motion for a directed verdict on Count V because Investors produced sufficient evidence to support a judgment on the claim brought under 42 U.S.C. § 1983 for violation of Investors' rights under the due process clause of the U.S. Constitution in that County overcharged Investors for recording services, the overcharging resulted from County's deviation from its own established policies and practices, and County failed and refused to refund such overcharges.

The standard of review of a trial court's denial of a motion for directed verdict or judgment notwithstanding the verdict is whether the plaintiff has made a submissible case. *Frankel*, 86 S.W.3d at 169. To make a submissible case, a plaintiff must present substantial evidence for every fact essential to liability. *Id.*

The standard of review for the denial of a motion for new trial is abuse of discretion by the trial court. *Twin Chimneys Homeowners Association*, 168 S.W.3d 488 (Mo. App. E.D. 2005). A new trial will be available only upon a showing that trial error or misconduct of the prevailing party incited prejudice in the jury. *Id.*

Evidence was presented that under Count V of the First Amended Petition, Investors was entitled to damages for violation of its right to due process under 42 U.S.C. §1983. Specifically, through Count V, Investors sought compensation for the deprivation of its property in the form of the overpayment of monies without due process of law, in violation of the 14th Amendment to the U.S. Constitution. LF 41-57. At the close of all the evidence, the trial court entered an order sustaining County's motion for directed verdict on Count VII. LF 335, App. at 9.

Liability on the part of County was proven by facts establishing the existence of a policy or practice followed by County's authorized decision makers that caused Investors' injury. *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997). Municipalities and other local governmental bodies are "persons" within the meaning of §1983. *Id.*, at 402. A plaintiff seeking to impose liability on a municipality under §1983 is required to identify a municipal "policy" or "custom" that caused the plaintiff's injury. *Id.*, at 404. Locating a "policy" ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality. *Id.* Similarly, an act performed pursuant to a "custom" that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law. *Id.*

It is not enough for a §1983 plaintiff merely to identify conduct properly attributable to the municipality. *Id.* The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. *Id.* That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights. *Id.*

The County may also be held liable under §1983 for inadequately training or supervising its employees. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989)(inadequate training may serve as the basis for §1983 liability); *Boswell v.*

County of Sherburne, 849 F.2d 1117, 1122-23 (8th Cir. 1987) (“it is well established that government officials may be held liable in damages for the constitutional wrongs engendered by their failure to train or supervise subordinates adequately.”)

County directly inflicted the injury in that County charged Investors more than the statutorily authorized fees for recording services. T at 61. An employee of County conducted the transactions that resulted in the County overcharging Investors. Culpability on the part of County was proven by facts that established the existence of a policy or practice followed by County’s authorized decision makers that caused Investors’ injury. T at 66, 147-166, 183. Evidence was presented that County’s widespread practices, customs and policies were the moving force behind Investors’ constitutional injury, and that County’s failure to properly supervise and its employees directly caused Investors’ injury. T at 88-93, 114, 289-290.

Investors presented facts establishing that County set up a policy to charge fees for services under which Investors and other title companies were required to submit blank checks for the payment of recording fees. T at 147-166. County employees determined the balance due and filled in those amounts as part of their normal and customary daily routine. T at 51, 95-97. Investors was overcharged by County pursuant to this policy. T at 61. These overcharges started at least as early as 1995, and continued until fall of 2001. T at 61.

Pursuant to County’s daily procedures concerning title companies, title

companies such as Investors would bring in a blank check made payable to the “Recorder of Deeds” to cover their daily charges. T at 147-166. A County employee, either the cashier or lead cashier, would determine the amount owed and fill in the dollar amount at the end of the day. T at 147-166. Furthermore, County’s refund policy placed an obligation on County to make unsolicited refunds for overpayments that County discovered. T at 117-122, 264-265.

County’s duty and failure to properly supervise its employees is apparent. The proper procedures the Recorder’s office was to follow, and the clear delineation of separate and distinct functions for the handling of cash within the Recorder’s office, are set forth in the Recorder’s Cash Management Policy. T at 101-102. According to County’s procedures and policies, the cashier was supposed to total all receipts received and then do a complete reconciliation of all the cash and the receipts of that day. T at 102-104, 263-264. The lead cashier was to then review the cashier’s reconciliation for accuracy. T at 104, 263. However, that was not the actual practice within the Recorder of Deed’s office for the time period in question. T at 105, 291-292, 347-349. The County’s own auditor admitted these significant omissions. T at 410-411, 420-429. The lead cashier started taking over duties that the cashier should have been doing, eliminating the second check. T 105. In fact, the cashier was doing all of the totaling and tallying for one set of title companies, while the head cashier was doing all the totaling and tallying for another set of title companies, which included Investors. T at 105-106, 347-349.

The random audit procedure set up to uncover improper activities is set forth in that same Cash Management Policy. T at 101-102, 267-269, 289. According to the policies and procedures, the lead cashier was also to prepare an audit package on a daily basis. T at 123-124. The cash handling procedure dictated that every six months random audits were to be performed by the Chief Deputy or Recorder to uncover improper activities. T at 267-269, 289. Part of the audit procedure would include looking at the charges for an individual title company to see how it compared to the check received from that title company. T at 267.

The County had a system in place that would have detected the overcharges long before fall of 2001 had it been properly monitored and performed. T at 280-288. Two documents generated by County on a daily basis, the DK08 and BL02, provided a summary of transactions for the day including the number of transactions, number of checks received, amount of checks and cash received, and the total amount for deposit. T at 280-288; Ex. 14 and 15. These documents were generated as a control feature and if the amounts received as checks and cash did not match up between the two documents, County was put on notice that there was a problem that needed to be further investigated. T at 280-288. These two documents were included in the daily audit packages and their review was part of the random audit obligation as dictated by the cash handling procedures of the Recorder's office. T at 289. The testimony of the County's own auditor said that if the numbers on the two documents did not match, it could be due to theft, but at

the very least would alert County as to possible error. T at 425.

That County breached their supervisory and oversight duties is obvious from the undisputed fact that a County employee was able to breach, and did in fact violate, the cash handling protocol set forth in County's Cash Management Policy for more than six years solely because County also continually violated their own Cash Management Policy by failing to conduct any random audits of the monetary transaction figures and recording receipts prepared during the time period at issue.

The evidence clearly established that the overcharging was the result of widespread practices, customs and policies of the Recorder's office. The evidence also established intentional lack of supervision and training. Accordingly, the evidence established that Investors was deprived of property without due process of law. Investors made a submissible case on Count V, a claim brought under 42 U.S.C. §1983 for violation of Investors' rights under the due process clause of the U.S. Constitution and therefore the trial court erred in granting County's motion for directed verdict and judgment notwithstanding the verdict.

VIII. The Trial Court erred in granting County's motion for directed verdict on Count VII because Investors introduced sufficient evidence to support a claim brought under 42 U.S.C. § 1983 for violation of Investors' rights under the equal protection clause of the U.S. Constitution in that County unlawfully and intentionally discriminated against Investors when it violated its established policies and procedures by refusing to issue Investors a refund for overpayments made for County services, thereby treating Investors differently from other individuals and entities similarly entitled to a refund.

The standard of review of a trial court's denial of a motion for directed verdict or judgment notwithstanding the verdict is whether the plaintiff has made a submissible case. *Frankel*, 86 S.W.3d at 169. To make a submissible case, a plaintiff must present substantial evidence for every fact essential to liability. *Id.*

Evidence was presented that under Count VII of the First Amended Petition, Investors was entitled to damages for violation of their right to equal protection under the law pursuant to 42 U.S.C. § 1983. Specifically, through Count VII, Investors sought compensation for the deprivation of its right to equal protection in violation of the 14th Amendment of the U.S. Constitution in that County, in violation of its established policies and procedures, refused to issue Investors a refund for the overpayments. LF 41-57. At the close of all the evidence, the trial court entered an order sustaining County's motion for directed verdict on Count VII. LF 335, App. at 9.

The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. *Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000). The equal protection clause protects citizens from arbitrary or irrational state action. *Batra v. Board of Regents*, 79 F.3d 717, 721 (8th Cir. 1996). Investors is not a member of a suspect class, or otherwise entitled to heightened scrutiny. *Vasquez-Velezmoro v. U.S. Immigration and Naturalization Service*, 281 F.3d 693, 697 (2002). Investors' equal protection claim, therefore, is analyzed under the deferential rational-basis standard. *Id.* To establish a claim under the Equal Protection clause, a plaintiff must establish that he was treated differently from others similarly situated to him. *Johnson v. City of Minneapolis*, 152 F.3d 859, 862 (8th Cir. 1998). Unequal treatment is not enough absent proof of an unlawful intent to discriminate against the plaintiff for an invalid reason. *Batra*, 79 F.3d at 721. Investors has shown all of the necessary elements.

Investors is a member of a class consisting of that group of individuals and entities who had made payments that exceeded those properly charged fees for recording, filing, copying or other services of the Recorder's office and met the criterion for receiving refunds for such overpayments or overcharges in compliance with the County's established policies and procedures. Investors furthermore established that it was treated differently from other individuals

within this class. See Ex. 21, Special Transit Reports (showing refunds to hundreds of other title companies). Unlike other individuals, and despite demand, Investors was not refunded the hundreds of thousands of dollars that were overcharged. T at 61, 140-141. This is despite the fact that the County consistently refunded such monies to other persons and title companies, even when not requested. T at 120-122, 264-265.

The County had a procedure for providing a refund for overpayments that they discovered or that were brought to their attention. T at 117-122, 264-265. While County's cash management procedures and manuals specify a \$10 lower limit on County's obligation to make unsolicited refunds, those procedures and manuals do not specify an upper cap on repayments of overcharges or overpayments and contain no time limit on either unsolicited or solicited refunds. T at 118; Ex. 20, Notice of Refund Policy.

Finally, Investors established that the discrimination was unlawful and purposeful. The only explanation given by the County for its failure to refund the monies was that Investors' request was too late. The County did not even refund money for the month or two immediately preceding the requested refund. Moreover, as the County's own procedures do not have any time limitation for the refund of money, and refunds are normally given as a matter of course, there is no lawful reason why the refund should not have been given, and this clearly shows purposeful discrimination.

County's unlawful intent to discriminate for invalid reasons was evidenced

by their clear intent to violate their own written refund policy by treating Investors' demand differently solely based on the size of the requested refund. Accordingly, Investors made a submissible case that their right to equal protection under the law was violated and therefore the trial court erred in granting County's motion for directed verdict and judgment notwithstanding the verdict as to Count VII.

IX. The Trial Court erred when it granted the County's motion for summary judgment on Count VIII (Negligence) and Count IX (Conversion) of Investors' First Amended Petition on the grounds that the County did not waive sovereign immunity because the County did have insurance coverage for torts of this nature which applied to this Count.

The review of a trial court's grant of summary judgment is essentially de novo. *ITT Commercial Finance Corp. v. Mid-American Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. Banc. 1993). The propriety of summary judgment is purely an issue of law. *Id.* The Court of Appeals need not defer to the trial court's order, as its judgment is founded on the record submitted in the law. *Id.* The criteria on an appeal for testing the propriety of summary judgment are no different from those which should be used by the trial court to determine the propriety of sustaining the motion in issue. *Id.*

In its First Amended Petition, Investors brought counts for negligence (Count VIII) and conversion (IX). The County moved for summary judgment on the grounds that such tort actions are barred by the doctrine of sovereign immunity

and that any insurance policies which the County may have did not cover such torts. LF at 62-116. The trial court granted the County's motion on these grounds. App. at 1; L.F. at 364.

The trial court's granting of the motion for summary judgment was an error as a matter of law. Under § 537.610 RSMo., when a public entity purchases liability insurance or duly adopts a self-insurance plan for tort claims, sovereign immunity is weighed to the extent of the amount provided and for the specific purposes set forth in the insurance plan. *Langley v. Curators of the University of Missouri*, 73 S.W.3d 808, 811 (Mo. App. W.D. 2002). The interpretation of the meaning of an insurance policy is a question of law. *Id.* at 812.

The County admitted that they purchased an insurance policy covering actions of its employees, including those within the Recorder of Deeds Office. LF at 64-66. The County's purchased insurance covers, and thus waives, sovereign immunity for both Investors' claim for conversion and for neglect of duty. As to conversion, the County essentially admits that it covers conversion in its motion for summary judgment as the exclusion form expressly includes conversion of property as a claim in which County is legally liable as a result of the tortuous conduct of an employee. LF at 64, 91. Furthermore, the County's insurance policy provides explicit coverage for "failure to perform duties," including "failure to supervise" employees under one's charge. LF at 90-92, 108. Thus, the insurance policies in effect for St. Louis County at the time covered the allegations contained in Counts IV and VIII of Investors' First Amended Petition. For these

reasons, the decision of the trial court was error, and this court should reverse it and remand this case for trial on these two counts.

CONCLUSION

For the reasons stated in Investors' Arguments in response to the County's Points I, II and III, the Judgment and Amended Judgment should be sustained. Furthermore, for the reasons set forth in response to the County's points IV and V, the Judgment should be sustained and Appellants' request to set aside the Judgment with instructions to grant Appellants a new trial should be denied. The Judgment and Amended Judgment should be reversed as stated in Point VI, with instructions to set aside the verdict of the jury and to enter judgment in favor of Plaintiff for damages pursuant to a five year statute of limitations period. For the reasons stated in Points VII and VIII, the trial court's order sustaining Defendants' motion for a directed verdict should be set aside, with instructions to enter judgment in favor of Plaintiff or in the alternative to grant Plaintiff a new trial. Finally, for the reasons set forth in Point IX, the trial court's grant of summary judgment on Plaintiff's claims for conversion and negligence should be set aside, and this Court should reverse and remand this case for a new trial.

RIEZMAN BERGER, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that one copy of this brief and a 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief were mailed, postage prepaid, this 14th day of July, 2006 to:

Patricia Redington
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word XP 2002 and contains 15,516 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.
